

REMARKS/ARGUMENTS

In response to the Non-Final Office Action dated March 14, 2006 in which restriction and species election requirements were made, the claims of Invention I (1-43) are hereby elected with regard to the restriction requirement as between the Invention I and II claims. As such, please cancel the claim of Invention II (claim 44) without prejudice.

Applicant traverses the Examiner's requirement for election of species. In compliance with 35 U.S.C. § 121, Applicant hereby elects, with traverse, the claims readable on Group I (different ways of detecting disruptions), Species Embodiment 1 (detecting a PVC, Group II (different ways to modify the pacing sequence), Species Embodiment 5 (adjusting the PVARP), Group III (different ways to deliver pacing using the modified pacing sequence), Species Embodiment 8 (restoring ventricular pacing), and Group IV (different ways to avoid PMT) Species Embodiment 12 (detecting PMT events). Applicant believes claims 1, 2, 6-8, 11-13, 17-19, 21, 25-27, 30-32, 36, 41-43 are readable on Embodiment 1, Embodiment 5, Embodiment 8 and Embodiment 11.

Having complied with 35 U.S.C. § 121, Applicant respectfully asserts that species election requirement is in error because: 1) embodiments restricted to different species or subspecies are not mutually exclusive (See, MPEP § 806.04(f)); 2) the Examiner has not complied with MPEP § 806.04(b) and 808.01(a) by discussing reasons leading to the conclusion that disclosed relations between species does not prevent restriction; and 3) the Examiner has not explained why there would be a serious burden on the Examiner if restriction is not required. (See, MPEP § 808.01 (a) and § 808.02).

MPEP 806.04(f) states "restriction to a single species may be proper if the species are mutually exclusive," (emphasis added). In the instant application, the species embodiments identified by the Examiner are not necessarily mutually exclusive embodiments. For example, Figure 12 illustrates a pacing sequence involving restoring ventricular tracking following a PVC (Embodiment 8), avoiding PMT (Embodiment 7), and implementing a ventricular tracking timing sequence (Embodiment 11). The Examiner has arbitrarily designated restoring ventricular tracking following a PVC, avoiding PMT, and implementing ventricular tracking as separate species, even though these features are not mutually

exclusive. All of the features can be implemented together in one embodiment as is illustrated by Figure 12.

As another example, restoring ventricular pacing (Embodiment 8) is not mutually exclusive with respect to pacing below an upper rate limit, (Embodiment 10), or avoiding pacing hysteresis (Embodiment 9).

The Examiner has designated each of these features as belonging to separate species even though these features are not mutually exclusive and can be used together. Applicant could provide numerous additional examples of the non-mutual exclusivity of purported species identified by the Examiner. Applicant respectfully asserts that the species election requirement is in error and should be withdrawn because the Examiner has not identified mutually exclusive species as indicated by MPEP § 806.04(f).

The species election requirement is erroneous because the Examiner has not met the burden set forth under MPEP § 806.04(b) and § 808.01(a) to provide reasons leading to a conclusion that a disclosed relation does not prevent restriction. For example, continuing with an earlier described example, Figure 12 illustrates a pacing sequence involving restoring ventricular tracking following a PVC (Embodiment 8), avoiding PMT (Embodiment 7), and implementing a ventricular tracking timing sequence (Embodiment 11). Thus, these species are related because they are not mutually exclusive and are usable with each other. (See, MPEP § 808.04(b)). Where there is a relationship disclosed between species, such disclosed relationship must be discussed and reasons advanced leading to the conclusion that the disclosed relation does not prevent restriction in order to establish the propriety of restriction. MPEP 808.01(a).

The Examiner has not discussed the relationships disclosed between the species or the reasons leading to the conclusion that the disclosed relation does not prevent restriction as required by the MPEP. For at least these reasons, the propriety of the Examiner's requirement for restriction has not been established and the species election requirement must be withdrawn.

In order to establish reasons for insisting upon restriction, the Examiner must explain why there would be a serious burden on the Examiner if restriction is not required. (See, MPEP § 808.01(a) which references MPEP § 808.02). Where related inventions as claimed

are shown to be independent or distinct, the Examiner, in order to establish reasons for insisting upon restriction, must explain why there is a serious burden if restriction is not required. To comply with this requirement, the Examiner must show by appropriate explanation one of the following (A) separate classification; (B) separate status in the art when they are classifiable together, or (C) a different field of search. (MPEP § 808.02).

The Examiner has not provided any explanation as to why there would be a serious burden if restriction was not required with regard to the 11 species and 5 subspecies identified in the Office Action as required by MPEP § 808.01(a) and § 808.02. For at least these reasons, the election of species requirement is in error and must be withdrawn.

In the above-made arguments, Applicant is contesting the propriety of the Examiner's election of species restriction requirement. Applicant, however, is not traversing on the ground that the species identified by the Examiner are not patentably distinct, but rather are asserting that the basis for requiring election between species is not supported.


Applicant respectfully reminds the Examiner that, upon allowance of a generic claim, Applicant is entitled to consideration of claims to additional species and subspecies, including those identified by the Examiner, pursuant to 37 CFR 1.141.

CONCLUSION

In view of the above, the Applicant respectfully requests reconsideration and withdrawal of the requirement for restriction. If the Examiner would find it helpful to discuss this issue by telephone, the undersigned attorney of record invites the Examiner to contact her at the number provided below.

Respectfully submitted,

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